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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/799,397

Filing Date: March 12, 2004

Appellant(s): ROY ET AL.

Everett G. Diedericks, Jr.
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 05/28/2009 appealing from the Office action
mailed 11/28/2008.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

| | | |
|-----------|---------------------|---------|
| 6,165,524 | Narayanaswamy et al | 12-2000 |
| 6,312,741 | Navarro | 11-2001 |
| 4,929,464 | Willyard et al | 05-1990 |

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1, 6-19 and 23-24 are rejected under 35 U.S.C. 103(a) as being unpatentable over Narayanaswamy et al. (US 6,165,524) in view of Navarro (US6, 312, 741).

In regard to claim 1, Narayanaswamy et al. disclose dry ingredients for use in a batter such as flour (Col.2 line 44), leavening system (Col. 10, lines 9-8), and encapsulated acid (Col.10, line 10). Narayanaswamy et al. disclose batter comprising about 10 to 40% flour and about 5 to 30% moisture (Col. 3 lines 3, 5,11).

Narayanaswamy et al. disclose that “the batters herein preferably further comprise only conventional Chemical leavening system” (Col. 10 lines 7-8). Narayanaswamy et al. disclose “in a preferred method of preparation, a preblend of the dry ingredients is made” (Col. 10 lines 42-43). Narayanaswamy et al. also disclose that “For greater convenience and shelf stability, dry mixes for baked goods have long been available. The consumer mixes the dry mix with liquid ingredients such as water, milk, oil and/or eggs to form a batter. The batter is then immediately poured into a baking pan and baked to form the finished baked goods” (Col. 1 lines 24-29). Since Narayanaswamy et al. disclose batter comprising about 10 to 40% flour and about 5 to 30% moisture (Col. 3 lines 3, 5,11), then Narayanaswamy et al. disclose about 70 to 95% of the dry composition in the batter which is formed from a dry mix composition and about 5 to 30% moisture. The amount of flour in the 70 to 95% dry composition is from about 10 to 40% which meets the limitation of the amount of flour in the dry composition.

In regard to claim 19, Narayanaswamy et al. disclose dry ingredients for use in a batter such as flour (Col.2 line 44), leavening system (Col. 10, lines 9-8), and encapsulated acid (Col.10, line 10). Narayanaswamy et al. disclose batter comprising about 10 to 40% flour and about 5 to 30% moisture (Col. 3 lines 3, 5,11). Narayanaswamy et al. disclose that “the batters herein preferably further comprise only conventional Chemical leavening system” (Col. 10 lines 7-8).

Narayanaswamy et al. do not disclose encapsulated acid in addition to the leavening system. Navarro discloses a method of providing an acid environment in baked goods and increasing its shelf life (Col. 1 lines 5-18). Navarro discloses “[t]he ingredient is a monodispersed fumaric acid particulate having a mean particle size of from about 70 microns to about 140 microns which is encapsulated with a coating having a melting point within normal baking temperature” (Col. 2 lines 39-43). Navarro discloses “[t]he ingredient is substantially cubical and preferably has a coating melting point of above 125 degrees Fahrenheit” (Col. 2 lines 57-58). Navarro discloses “[a]s a result of the present invention an acid environment conducive to preserving antimicrobial ingredients after baking without deleteriously affecting the bread dough before baking is provided” (Col. 4 lines 19-22). In regard to claim 1, Navarro discloses from about 0.1 to 0.7% of encapsulated acid (Col. 4 lines 10-12). In regard to claims 18 and 24, Navarro discloses encapsulated acid “has a coating melting point of above 125 degrees Fahrenheit” (Col. 2 lines 57-58).

Since, Narayanaswamy et al. disclose using dry mix composition for the preparation of the shelf stable batter, and Navarro discloses increasing shelf stability in

the final baked product by incorporating encapsulated fumaric acid into the dry mix composition, which is Appellants' intention as well, one of ordinary skill in the art would have been motivated to modify Narayanaswamy et al and to employ encapsulated fumaric acid for the benefits as disclosed by Navarro. One of ordinary skill in the art would have been motivated to do so in order to increase shelf-stability of the final product without prematurely acidifying the batter/dough as taught by Navarro. Since, Narayanaswamy et al. disclose making a "preblend of the dry ingredients", and greater shelf stability of dry mixes, it would have been obvious to form a dry mix blend with a higher shelf stability. It would also have been obvious to use encapsulated acid having coating melting point as suggested by Navarro in the amounts as suggested by Navarro. One of ordinary skill in the art would have been motivated to modify the particle sizes of the capsule depending on the desired thickness of the particle coating, amount of the active substance contained, desired degree of delay for solubility, etc. One of ordinary skill in the art would have been motivated to modify the particle sizes of the capsule depending on the specific type of bakery product, desired amount of acid in the product, specific temperature and moisture conditions associated with various bakery products.

In regard to claims 6 and 25, Narayanaswamy et al. disclose use of propionic acid (Col.14, Claim 26).

In regard to claim 7, Narayanaswamy et al. disclose use of about 20%-70% sugar (Col.3, line 4).

In regard to claims 8 and 26, Narayanaswamy et al. disclose use of about 1% to 25% of an edible fat or shortening (Col.5, lines 11-12).

In regard to claims 9 and 27, Narayanaswamy et al. disclose use of about 1% to 8% of emulsifiers (Col.6, lines 40-41).

In regard to claims 10 and 28, Narayanaswamy et al. disclose use of about 1% to 8% of a humectant (Col.7, lines 64-68).

In regard to claims 11 and 29, Narayanaswamy et al. disclose use of hydrophilic colloid (Col. 8, lines 51-58).

In regard to claims 12 and 30, Narayanaswamy et al. disclose use of starch (Col.2, line 46).

In regard to claims 13 and 31, Narayanaswamy et al. disclose use of non-fat dry milk solids (Col.9, lines 23-25).

In regard to claims 14 and 32, Narayanaswamy et al. disclose use of flavor agents (Col.9, lines 8-13).

In regard to claims 15 and 33, Narayanaswamy et al. disclose use of coloring agents (Col.9, lines 8-10).

In regard to claims 16 and 34, Narayanaswamy et al. disclose use of edible inclusions such as butterscotch, chocolate, peanut butter chips, etc (Col. 9, lines 11-13).

In regard to claims 17 and 23, Narayanaswamy et al. is silent as to the fried bakery products. In regard to claim 17, Narayanaswamy et al. disclose "while the invention is specifically described in terms of improved baked goods, such as layer cakes, muffins, quick breads, cupcakes, biscuits, baked corn bread, the batters can be

used for or formulated for use to prepare other cooked farinaceous goods within the scope of this invention including griddle cakes such as pancakes, crepes or cornbread, Irish soda bread or waffles. Also, while the present articles are especially suited for use for preparing leavened finished goods, other finished goods can also be prepared therefrom" (Col. 8 lines 19-27). Since, Narayanaswamy et al. disclose preparing "other cooked farinaceous goods", it would have been obvious to one of ordinary skill in the art to modify invention of Narayanaswamy et al and prepare cake donuts or other fried bakery products.

Claims 35-45 and 57-62 are rejected under 35 U.S.C. 103(a) as being unpatentable over Narayanaswamy et al. (US 6,165,524) in view of Navarro (US6, 312, 741) and Willyard et al. (US 4,929,464).

Narayanaswamy et al. and Navarro are taken as cited above. As stated above, in regard to claims 35, 45 and 58, combination of Narayanaswamy et al. and Navarro disclose a method for preparing a bakery product, comprising the steps of providing a dry mix of flour, chemical leavening system and from 0.1% to 0.7% encapsulated acid; forming a batter comprising 10 to 40% flour and about 5 to 30% moisture, allowing the leavening system to react in said batter. In regard to claim 36, combination of Narayanaswamy et al. and Navarro disclose fumaric acid. In regard to claim 40, Narayanaswamy et al. disclose use of propionic acid (Col. 14, Claim 26). In regard to claim 41, Narayanaswamy et al. disclose use of about 20%-70% sugar (Col. 3, line 4). In regard to claim 42, Narayanaswamy et al. disclose use of about 1% to 25% of an edible fat or shortening (Col.5, lines 11-12). In regard to claim 43, Narayanaswamy et

al. disclose use of about 1% to 8% of emulsifiers (Col.6, lines 40-41). In regard to claim 44, Narayanaswamy et al. disclose use of non-fat dry milk solids (Col.9, lines 23-25). In regard to claim 57 and 62, combination of Narayanaswamy et al. and Navarro encapsulated acid "has a coating melting point of above 125 degrees Fahrenheit" (Col. 2 lines 57-58).

Narayanaswamy et al. and Navarro are silent as to the depositing individual-serving size portions of said batter into heated oil, deep-frying the batter in oil having a temperature of about 270°F to about 400°F to produce a fried bakery product, wherein the fried bakery product achieves an internal cooked temperature of about 170°F to about 230°F; and wherein said fried bakery products have a yeast-free and mold-free shelf life of at least 21 days.

Willyard et al. disclose a method for preparing a fried bakery product, comprising providing a dry mix comprising about 58.9% (+13% ; or -13%) flour (Col. 3 Table 1); chemical leavening system, dry milk solids, sugar, humectants, flavors, emulsifiers, fats and other ingredients (Col. 2 line 12-18), forming a batter comprising a dry mix and moisture in a ratio of dry mix to moisture of 100:33 (Col. 3 table 1; Col. 3 lines 39-45), allowing the leavening system to react in said batter, depositing individual-serving size portions of said batter into heated oil and deep-frying the batter in oil having a temperature of about 350°F to produce a fried bakery product (Col. 2 line 12-18; Col. 4 lines 26-35). In regard to claim 61, Willyard et al disclose cake donut (Col. 3 Table 1).

Since, Narayanaswamy et al. disclose preparing "other cooked farinaceous goods" from the composition comprising flour, moisture, chemical leavening system,

dry milk solids, sugar, humectants, flavors, emulsifiers, fats and other ingredients, and Willyard et al. disclose deep-frying individual-serving size portions from the composition comprising flour, moisture, chemical leavening system, dry milk solids, sugar, humectants, flavors, emulsifiers, fats and other ingredients in oil having to prepare cake donuts, it would have been obvious to one of ordinary skill in the art to modify disclosure of Narayanaswamy et al in view of Navarro and employ method steps discloses by Willyard et al. in order to produce desired fried bakery products.

Willyard et al. is silent as to the internal cooking temperature and shelf life of the fried product. In regard to the internal cooking temperature Willyard et al. discloses the fried bakery product having "flaky interior illustrating that complete cooking have been accomplished" (Col. 4 lines 33-34). Regarding internal cooking temperature and shelf life of the fried product (see claims 35, 38, 39, 58, 59 and 60), it is noted that although the references do not specifically disclose every possible quantification or characteristic of its product, such as internal cooking temperature and shelf life of the fried product, these characteristics would have been expected to be in the claimed range absent any clear and convincing evidence and/or arguments to the contrary. The combination of references disclose the same starting materials and methods as instantly (both broadly and more specifically) claimed, and thus one of ordinary skill in the art would recognize that the internal cooking temperature and shelf life of the fried product, among many other characteristics of the product obtained by referenced method, would have been an inherent result of the process disclosed therein. The Patent Office does not possess the facilities to make and test the referenced method and product obtain by such method,

and as reasonable reading of the teachings of the references has been applied to establish the case of obviousness, the burden thus shifts to applicant to demonstrate otherwise.

In regard to claim 37, as stated above, one of ordinary skill in the art would have been motivated to modify the particle sizes of the capsule depending on the desired thickness of the particle coating, amount of the active substance contained, desired degree of delay for solubility, etc.

(10) Response to Argument

Applicant's arguments have been fully considered but they are not persuasive.

On page 9 of the Appeal Brief, Appellants state that:

Examiner relies on Narayanaswamy et al., which teaches a batter composition, not a shelf stable dry mix composition as taught by claim 1. The Examiner then attempts to modify the batter of Narayanaswamy et al. with the teachings of Navarro which is directed to a baked product. Therefore, it must be initially realized that Narayanaswamy is concerned with a shelf stable batter, Navarro is concerned with prolonging the shelf life of an already baked product, and claim 1 is directed to a dry mix. To this end, the Applicant would submit that one of ordinary skill in the art would not even look to an invention concerned with preserving an already baked product (Navarro to modify a batter intended to be placed on a Store shelf and used to make a baked product which would be presumably, immediately consumed by a consumer (Narayanaswamy). In addition, it cannot be overlooked that neither of these prior art patents is directed to a dry mix composition as claimed. Furthermore, neither N Narayanaswamy et al. nor Navarro teach 50-80% flour as claimed, the amount of acid claimed, or a mean particle size of the acid of about 150-840 microns as claimed.

In response to this argument, it is noted that dry mix composition and moisture form batter, and the baked product is further produced from the batter. The bakery product could not be formed without batter, and the batter could not be formed without

dry mix. As stated above, Narayanaswamy et al. disclose dry ingredients for use in a batter such as flour (Col.2 line 44), chemical leavening system (Col. 10, lines 9-8), and encapsulated acid (Col.10, line 10). Narayanaswamy et al. disclose batter comprising about 10 to 40% flour and about 5 to 30% moisture (Col. 3 lines 3, 5,11). Since Narayanaswamy et al. disclose batter comprising about 10 to 40% flour and about 5 to 30% moisture (Col. 3 lines 3, 5,11), Narayanaswamy et al. disclose about 70 to 95% of the dry composition in the batter which is formed from a dry mix composition and about 5 to 30% moisture. The amount of flour in the 70 to 95% dry composition is from about 10 to 40% meets the limitation of the amount of flour in the dry composition.

Narayanaswamy et al. do not disclose encapsulated acid as recited in addition to the leavening system. Navarro discloses a method of providing an acid environment in baked goods and increasing its shelf life (Col. 1 lines 5-18). Navarro discloses “[t]he ingredient is a monodispersed fumaric acid particulate having a mean particle size of from about 70 microns to about 140 microns which is encapsulated with a coating having a melting point within normal baking temperature” (Col. 2 lines 39-43). Navarro discloses “[a]s a result of the present invention an acid environment conducive to preserving antimicrobial ingredients after baking without deleteriously affecting the bread dough before baking is provided” (Col. 4 lines 19-22). In regard to claim 1, Navarro discloses fro about 0.1 to 0.7% of encapsulated acid (Col. 4 lines 10-12). Since, Narayanaswamy et al. disclose using dry mix composition for the preparation of the shelf stable batter, and Navarro discloses increasing shelf stability in the final baked product by incorporating encapsulated fumaric acid into the dry mix composition, which

is Appellants' intention as well, one of ordinary skill in the art would have been motivated to modify Narayanaswamy et al and to incorporate encapsulated fumaric acid into the dry mixture composition for the benefits as disclosed by Navarro. One of ordinary skill in the art would have been motivated to do so in order to increase shelf-stability of the final product without prematurely acidifying the batter/dough as taught by Navarro. Since, Narayanaswamy et al. disclose making a "preblend of the dry ingredients", and greater shelf stability of dry mixes, it would have been obvious to form a dry mix blend with a higher shelf stability. It would also have been obvious to use encapsulated acid in the amounts as suggested by Navarro.

In regard to Appellants' arguments regarding particle sizes of the capsule (pages 9-11, 13-14 and 17-18 of the Reply Brief), one of ordinary skill in the art would have been motivated to modify the particle sizes of the capsule depending on the desired thickness of the particle coating, amount of the active substance contained, desired degree of delay for solubility, etc. One of ordinary skill in the art would have been motivated to modify the particle sizes of the capsule depending on the specific type of bakery product, desired amount of acid in the product, specific temperature and moisture conditions associated with various bakery products.

In response to the Appellants' arguments regarding melting point temperature (page 12 second paragraph, page 15 third paragraph, page 19 bottom paragraph page 22 top paragraph of the Appeal Brief), Navarro discloses encapsulated acid "has a coating melting point of above 125 degrees Fahrenheit" (Col. 2 lines 57-58). In regard to

this argument, it is noted that the range of above 125°F encompasses the minimum point 150°F, and therefore establishes *prima facie* case of obviousness.

In response to the Appellants' arguments regarding amount of encapsulated (page 12 second paragraph of the Appeal Brief), it is noted that Navarro discloses from about 0.1 to 0.7% of encapsulated acid (Col. 4 lines 10-12).

On page 16 of the Appeal Brief, Appellants state that “[n]either Narayanaswamy et al. nor Navarro teach the step of deep-frying batter in oil to produce a fried bakery product having an internal cooked temperature of about 170°-230°F as required by claim 35”. In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). Neither Narayanaswamy et al. nor Navarro are relied upon as teaching of producing fried bakery product. Willyard et al. disclose a method for preparing a fried bakery product, comprising providing a dry mix comprising about 58.9% (+13% ; or - 13%) flour (Col. 3 Table 1); chemical leavening system, dry milk solids, sugar, humectants, flavors, emulsifiers, fats and other ingredients (Col. 2 line 12-18), forming a batter comprising a dry mix and moisture in a ratio of dry mix to moisture of 100:33 (Col. 3 table 1; Col. 3 lines 39-45), allowing the leavening system to react in said batter, depositing individual-serving size portions of said batter into heated oil and deep-frying the batter in oil having a temperature of about 350°F to produce a fried bakery product

(Col. 2 line 12-18; Col. 4 lines 26-35). The same refers to Applicants' arguments presented on page 20 bottom paragraph of the Appeal Brief.

In response to the arguments regarding internal cooking temperature and shelf life of the fried product (page 16 bottom paragraph, page 19 second paragraph, page 21 second paragraph), Willyard et al. is silent as to the internal cooking temperature and shelf life of the fried product. In regard to the internal cooking temperature Willyard et al. discloses the fried bakery product having "flaky interior illustrating that complete cooking have been accomplished" (Col. 4 lines 33-34). Regarding internal cooking temperature and shelf life of the fried product (see claims 35, 38, 39, 58, 59 and 60), it is noted that although the references do not specifically disclose every possible quantification or characteristic of its product, such as internal cooking temperature and shelf life of the fried product, these characteristics would have been expected to be in the claimed range absent any clear and convincing evidence and/or arguments to the contrary. The combination of references disclose the same starting materials and methods as instantly (both broadly and more specifically) claimed, and thus one of ordinary skill in the art would recognize that the internal cooking temperature and shelf life of the fried product, among many other characteristics of the product obtained by referenced method, would have been an inherent result of the process disclosed therein. The Patent Office does not possess the facilities to make and test the referenced method and product obtain by such method, and as reasonable reading of the teachings of the references has been applied to establish the case of obviousness, the burden thus shifts to applicant to demonstrate otherwise.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Vera Stulii/

Examiner, Art Unit 1794

Conferees:

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